UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BONNIE SCHUSTER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-270-B***
	)	
LARRY G. MASSANARI,[1]	***)***	
Acting Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal is brought by the plaintiff *pro se*. The plaintiff clarified at oral argument that she challenges the sufficiency of the evidence to support the commissioner's determination that she does not have a severe impairment. I recommend that the commissioner's decision be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on February 21, 1997, the date she stated she became unable to work, and had sufficient quarters of coverage to remain insured through at least March 31, 2002, Finding 1, Record at 16;

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on August 9, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

that she had not engaged in substantial gainful activity since February 21, 1997, Finding 2, *id.*; that she had medically determined essential hypertension, osteoarthritis, refractive error of vision and scoliosis of the spine, Finding 3, *id.*; that her statements concerning her impairments and their impact on her ability to work were not entirely reliable because her elaboration of symptoms and her endorsement of many unproven illnesses was not congruent with a series of essentially benign medical examinations, Finding 4, *id*.; that she did not have an impairment which significantly limited her ability to perform basic work-related functions and therefore did not have a severe impairment, Finding 6, *id*.; and that she was not under a disability as defined in the Social Security Act at any time through the date of the decision, Finding 7, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge's decision was made at Step 2 of the sequential evaluation process. The claimant bears the burden of proof at this step, but it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id*. at 1124 (quoting Social Security Ruling 85-28).

There is no medical evidence in the administrative record to suggest that any of the impairments identified by the administrative law judge — hypertension, osteoarthritis, refractive error of vision and scoliosis of the spine — would have more than a minimal effect on the plaintiff's ability to work. The plaintiff testified about symptoms that she believed to be related to these impairments that would have such an effect, Record at 25-36, but a claimant's testimony about symptoms is insufficient to establish a severe impairment at Step 2 in the absence of medical evidence of an underlying disease or medical condition that could cause the symptoms. 20 C.F.R. §§ 404.1508, 416.908.

The plaintiff testified that an unidentified doctor at a clinic in Liberty, Maine told her after the day the plaintiff last worked that she "could not work because [she] had high blood pressure and that [she] would not be able to work until they got a diagnosis and got the high blood pressure under control," Record at 27, but this assertion is not supported by the medical records in the administrative record. The Donald S. Walker Health Center is the only facility for which records have been provided that is located in Liberty, Maine, *id*. at 151, and none of those records even mentions hypertension, *id*. at 150, 157. The administrative law judge found that the plaintiff's hypertension "is shown to be under good control," *id*. at 14, a finding for which there is some supportive medical evidence, *id*. at 138. In any event, there is no medical evidence that the hypertension would affect the plaintiff's ability to perform basic work tasks, and at least one consulting physician found specifically that the hypertension would not have any such effect. *Id*. at 177, 183.

With respect to osteoarthritis, consulting physicians found that the medical evidence disclosed that this impairment would not limit the plaintiff's ability to perform basic work-related functions. *Id*. at 163, 176-83. That is sufficient evidence to support the administrative law judge's conclusion.

There is no evidence whatsoever in the administrative record that would suggest that the plaintiff's scoliosis of the spine has any effect on her ability to perform basic work-related functions. The only evidence of such an effect that might be caused by a refractive error of vision is the plaintiff's own testimony, *id*. at 29-30, which as stated previously is insufficient at Step 2. The only medical record in the

administrative record concerning the plaintiff's vision contains test results and diagnoses, but no suggestion of work-related limitations. *Id*. at 235-36.

At oral argument the plaintiff explained that in essence she pursued this appeal because the administrative law judge "had nothing to go on" by way of medical documentation of her impairments, that all of her diagnoses subsequently had changed and that her condition was getting worse. In keeping with this representation, the plaintiff's itemized statement of errors suggests that she should have been found to be suffering from forgetfulness, diabetes, idiopathic bilateral pedal edema, bipolar disorder and fibromyalgia, all of which, she claims, should have been determined to be severe impairments at Step 2. Factors from Transcript to consider (attached to Fact Sheet, Docket No. 4) at [1]-[4]. The plaintiff noted at oral argument that she hoped (although warned otherwise by former counsel) that her new diagnoses could be taken into consideration in connection with this appeal. Counsel for the commissioner argued that the plaintiff's remedy was to file a new claim – which indeed she represented at oral argument she did in December 2000. I agree that the plaintiff's attempt to construct a belated foundation of medical evidence to bolster the instant claim falls short.

With respect to fibromyalgia, the only evidence the plaintiff offers is her statement that since August 1999 she has been seeing a physician's assistant at Unity Osteopathic Clinic who has made this diagnosis. *Id*. at [3]-[4]. The hearing before the administrative law judge in this matter was held on March 11, 1999. Record at 18. The record was not left open at the time of the hearing for the submission of any new evidence. In addition, any new diagnosis made after the date of the administrative law judge's decision (which counsel for the commissioner confirmed was May 19, 1999) may not be considered in connection with this application. *See* 20 C.F.R. §§ 404.970(b), 416.1470(b) (Appeals Council will consider additional evidence only when it relates to period on or before date of administrative law judge's decision); *Gonzalez-Ayala v. Secretary of Health & Human Servs.*, 807 F.2d 255, 256 (1st Cir. 1986) (ordinarily, court will not review claims not made before agency). In addition, no medical evidence has been submitted in support of this assertion. Finally, a physician's assistant is not considered an acceptable medical source, 20 C.F.R. §§

404.1513(a), 416.913(a), and his report is therefore entitled to no more weight than would be given to information from "other sources," such as "[o]bservations by non-medical sources," 20 C.F.R. §§ 404.1513(e), 416.913(e), none of which would be sufficient to establish an impairment at Step 2. For all of these reasons, fibromyalgia cannot be considered a severe impairment in this case.

The plaintiff does provide medical records to support her post-hearing allegations of pedal edema, Record at 227-34, but again this diagnosis was first made after the administrative law judge's decision was issued and for the reasons discussed above may not be considered in connection with the pending application for benefits. In addition, there is no indication in the medical records that the condition is anything other than temporary, so that evidence of the required minimal twelve-month duration, 20 C.F.R. §§ 404.1509, 416.909, is lacking and the plaintiff's burden of proof at Step 2 has not been met as to this claimed impairment.

There is no medical evidence to tie the plaintiff's testimony about forgetfulness to any medical or psychiatric condition, so that alleged impairment could not meet the minimal evidentiary requirements at Step 2. The question of bipolar disorder raised in the medical records, Record at 136, 138 (note of September 25, 1997), was rejected by the examining psychiatrist, *id*. at 193-99 ("no diagnosable psychiatric condition;" report dated September 28, 1998) and consulting psychologists, *id*. at 164-72 (dated February 9, 1998), 184-92 (dated June 4, 1998). Therefore, the fact that the administrative law judge did not find bipolar disease to be a severe impairment at Step 2 does not constitute error. The only diagnosis of diabetes in the record, *id*. at 220 (May 14, 1998), was subsequently found to be erroneous, *id*. at 206 (June 11, 1998), and, as was the case with the alleged bipolar disease, cannot for that reason be found to be a severe impairment.

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo

review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of August, 2001.

_____
David M. Cohen
United States Magistrate Judge

PORTLD ADMIN
U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-270

SCHUSTER v. SOCIAL SECURITY, COM Filed: 12/28/00
Assigned to: Judge GEORGE Z. SINGAL
Demand: $0,000 Nature of Suit: 863
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 42:405 Review of HHS Decision (DIWC)

BONNIE SCHUSTER BONNIE SCHUSTER
plaintiff [COR LD NTC] [PRO SE]
586 VALLEY ROAD
JACKSON, ME 04921

v.

SOCIAL SECURITY ADMINISTRATION JAMES M. MOORE, Esq.
COMMISSIONER [COR LD NTC]
defendant U.S. ATTORNEY'S OFFICE

P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344

JOSEPH DUNN, ESQ.
[COR LD NTC]
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
617/565-4277